76-511

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

SIDNEY SALOMON, JR., et al.,
Petitioners,

vs.

CROWN LIFE INSURANCE COMPANY,
Respondent.

No. .....

CROWN LIFE INSURANCE COMPANY,
Respondent,

vs.

SIDNEY SALOMON JR. & ASSOCIATES, INC., et al.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Rules Provision Involved 3

Statement of the Case 3

Reasons for Granting the Writ 11

Conclusion 22

Appendix A (Opinion of the United States Court of Appeals for the Eighth Circuit) A-1

Appendix B (Opinion of the United States District Court for the Eastern District of Missouri) A-25

Case Citations

Cousin v. Cousin, 192 F.2d 377 (8th Cir. 1951) 20

Lindsay v. McDonnell Douglas Aircraft Corporation, 485 F.2d 1288 (8th Cir. 1973) 11

Mears v. Olin, 527 F.2d 1100 (8th Cir. 1975) 11

National Rejectors, Inc. v. Trieman, 409 S.W.2d 1 (Mo. 1966) 20-21

Pendergrass v. New York Life Ins. Co., 181 F.2d 136 (8th Cir. 1950) 13, 15

Safety Motors v. Elk Horn Bank and Trust Co., 217 F.2d 517 (8th Cir. 1954) 13

Thau-Nolde, Inc. v. Krause Dental Supply and Gold Co., 518 S.W.2d 5 (Mo. 1974) 20, 21

United States v. Yellow Cab Co., 338 U.S. 338, 70 S.Ct. 177 (1949) 16

Weiby v. Farmers Mutual Automobile Insurance Co., 273 F.2d 327 (8th Cir. 1960) 20

Zenith Corp. v. Hazeltine, 395 U.S. 100, 89 S.Ct. 1562 (1969) 15

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To the United States Court of Appeals for the Eighth Circuit

The petitioners, Sidney Salomon, Jr., and Sidney Salomon, Jr. & Associates, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, reversing a judgment entered in favor of petitioners on March 4, 1975 by the United States District Court for the Eastern District of Missouri, entered in the above entitled causes on June 23, 1976, after which a petition for rehearing was denied on July 16, 1976.

Portnoy, Tessler & Associates, Inc. plaintiff/intervenor in the District Court, and Appellant in the Court of Appeals joins in this petition and prays that a writ of ceritorari be granted.

OPINIONS BELOW

The opinion of the Court of Appeals, (Appendix A, infra, p. A-1) is reported at 536 F.2d 1233. The opinion of the District Court (Appendix B, Infra, p. A-28) is reported at 399 F.Supp. 93.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1976. A timely petition for rehearing was denied on July 16, 1976. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Court of Appeals when reviewing the Judgment of a District Judge sitting without a jury may take a view of the evidence which is not in the light most favorable to the party which prevailed in the District Court, and engage in a de novo reevaluation of the credibility of oral testimony, and other evidence already heard and viewed by the District Judge.

2. Whether a Court of Appeals when reviewing the judgment of a District Judge sitting without a jury may make new findings of fact based upon testimony which the District Judge found not to be credible.

3. Whether a Court of Appeals may use its own findings of fact which are based upon a de novo review of the evidence and are contrary to the findings of the District Court as a basis for making different conclusions of state law in a diversity case tried without a jury.

RULES PROVISION INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure, dealing with the scope of review of findings of fact made by a court sitting without a jury provides in pertinent part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

This case was initiated by petitioners on September 8, 1972 in the United States District Court for the Eastern District of Missouri, against respondent, Crown Life Insurance Company, a citizen or subject of Canada. The jurisdiction of that court was invoked pursuant to the provisions of Title 28, United States Code, Section 1332(a)(2). Petitioners sought relief for tortious interference with business relations in the form of actual and punitive damages, and injunctive relief to prevent respondent from using the business records of petitioners. In a related case which was subsequently consolidated with petitioners case respondents sought an order requiring petitioners and Insurance Consultants, Inc. d/b a Sidney Salomon, Jr. Life Assurance Agency to deliver certain records, to prohibit the use of said records and for damages.

Sidney Salomon, Jr. represented Crown Life Insurance Company in Missouri as its general agent and as a broker from 1946 until Crown terminated the relationship by letter dated August 9, 1972. Salomon's business relations with Crown took a number of different corporate and business forms over the years, but Crown always wanted Salomon to be personally responsible to it and was not concerned with the structure of Salomon's busi-

ness organization. During this entire 26 year period, in accordance with Crown's wishes, the Crown general agency in Missouri bore Salomon's name. Crown enjoyed great success by reason of Salomon's efforts over the years, as Salomon put a great deal of time, effort and personal expense into promoting Crown's business in Missouri.

A detailed chronology of the earlier entities through which Salomon conducted his general agency for Crown can be found in the opinions of the courts below. The last of these entities was created on May 15, 1971, when Sidney Salomon, Jr. & Associates, Inc. entered into a joint venture with Insurance Consultants, Inc. under the name Sidney Salomon, Jr. Life Assurance Agency. The Memorandum between the two provided that in the event of the termination of the joint venture, the general agency contact with Crown Life would belong to Sidney Salomon Jr. & Associates, Inc. The Memorandum was forwarded to Crown. As early as April 7, 1971, Crown inquired about the arrangements and signatures on the new contract. The papers required to process this agreement were forwarded to Sidney Salomon, Jr. (Salomon) by Crown for Salomon's consideration. Salomon executed the agreement on behalf of Sidney Salomon, Jr. & Associates, Inc. with an effective date of May 15, 1971. It was this entity to which the termination leter of August 9, 1972 was sent.

Robert Klostermeyer, James T. Blair and W. Andrew Bradley were employees of Salomon at the time of his termination as an agent for Crown.

Salomon recruited Blair as a broker in 1957 and Blair continued to work for Salomon until sometime in August, 1972. Klostermeyer was recruited by Salomon in 1961, and remained continuously associated with him until August 1972. Bradley entered the employ of Salomon Associates, Inc., in 1970, having previously been employed by Crown in Canada, and continued

to be associated with the Salomon agency until August, 1972. Blair received compensation from Salomon Associates, Inc., as late as August 1, 1972, and from the Salomon Agency as late as August 31, 1972. Klostermeyer continued to process business of the "S. Salomon, Jr. Agency" until at least August 8, 1972 (Ex. 334). In addition, Klostermeyer made long-distance phone calls to Canada for his own personal business including matters relating to a new General Agency for Crown from the offices of the Salomon Agency and at its expense.

Neither Klostermeyer, Blair or Bradley ever expresed dissatisfaction to Salomon about their association with Salomon.

Klostermeyer's projection of estimated new writings for the Salomon Agency in 1972 was in the amount of $5,450,000 (Exhibit 173 below).

On July 28, 1972, Klostermeyer, Blair and Bradley incorporated Crown Associates of St. Louis, Inc. which was to supplant Salomon's general agency. All of the activity which led up to the formation of this new agency was done prior to the termination of the Salomon agency and without Sidney Salomon Jr's. knowledge. The exact nature and extent of these activities was the subject of substantial oral testimony and it is the view of this testimony taken by the Court of Appeals, being in conflict with the view taken by the District Court, that is at the heart of this petition, therefore, further discussion of these matters will be found in the section stating the reasons for granting this petition.

In May, 1972, David Williams, a senior Crown officer, visited Klostermeyer, Blair and Bradley in St. Louis. On July 5, 1972, Klostermeyer went to Canada. Klostermeyer said that his trip to Canada was in response to Crown's invitation in the spring of 1971. Neither Salomon nor Ruth Hall, Sidney Salomon, Jr.'s secretary for 36 years, knew that Klostermeyer was going. Klostermeyer and officers of Crown conferred about the termina-

tion of the Salomon Agency. Klostermeyer solicited the agency for himself.

On July 6, 1972, Williams assured Miss Hall that Sidney Salomon, Jr. would always have a contract.

The next day, July 7th, Clark Lloyd, Crown's Senior Agency Vice President, discussed the St. Louis agency with Klostermeyer and David Williams. The District Court found that Klostermeyer was a broker and employee of plaintiff Salomon at this time. On the same date, Klostermeyer called Blair in Texas and informed him of these discussions with Crown. On July 10th, Klostermeyer told Bradley to begin to look for office space for the new agency.

On July 12, 1972, Robert Dowsett, President of Crown, sent a confidential memorandum to Lloyd inquiring about the advisibility of retaining the Salomon name in the new General Agency as a gesture to gain Salomon's support, if Klostermeyer and Blair would not feel they would have to pay too much in extra bonuses to Salomon.

Dowsett called Charles Burns, Chairman of the Board of Crown, its vice president, Arthur Williams, and its retired vice president, Maurice Gilbert, to forewarn them of possible developments concerning the Salomon agency. Dowsett had never before taken such action concerning any other agent.

Many of the above facts were also the subject of disputed testimony and will be discussed further in the subsequent section.

On July 24, 1972, Lloyd visited Salomon in St. Louis to discuss the general agency. Previously Dowsett, had made suggestions to Lloyd concerning the use of the Salomon name in a new agency, as a "gesture" to Salomon to gain his support for Crown's actions, so that he would not have to lose pride as well as the control over the direction of the Agency. Lloyd did not

disclose to Salomon that he had received these suggestions from Dowsett.

Lloyd outlined his own proposal for a new agency and at the same time took notes. Miss Hall also took notes. Lloyd suggested an organization consisting of a super-general agency *which he would run* and said that Salomon would still have a general agency. Lloyd said for the present Sidney Salomon Jr. & Associates, Inc., would function as before.

Lloyd said that the shares of the stock in the new general agency would be held by Crown's Chairman, Charles Burns. Sidney Salomon, Jr. questioned the legality of this stock holding arrangement. Lloyd told Salomon that there were ways of getting around it. When the meeting concluded Salomon was satisfied that an agreement had been reached between the parties. Lloyd expressed no dissatisfaction and made no mention of his later stated belief that the Salomon Agency was dissolved some weeks earlier. Lloyd was to contact Salomon again within a week. Salomon received no further communication from Crown until August 14, 1972, when he received the termination letter.

By letter dated August 9, 1972, Crown terminated the contract with the Salomon Agency. Lloyd sent a separate letter to Salomon dated August 9, 1972, expressing his regrets at the termination and relating the company's policy of "single company representation" and requirement of an agent's full time undivided attention as reasons for the termination. Lloyd also expressed the hope that the new representative and Salomon would be able to negotiate an agreement mutually profitable. Klostermeyer already had made a decision that Salomon would not be part of the new agency.

Lloyd said he called and talked to Miss Hall on the date of the letter of termination to tell her the letter was being sent. Miss Hall denied receiving such a call from Lloyd and said Lloyd's testimony was not the truth.

By memo dated August 9, 1972, Lloyd disclosed that he was sure the Crown could count on the strong political influence on the side of the new General Agents:

> "Political pressure must be considered . . . there is strong political influence on the side of the new General Agents. I am sure we can count on it."

Lloyd also expressed the thought that "if the course of action we follow proves not to be in the best interests of the new General Agent, all that we lose is a small part of our market, whereas the new General Agent will lose his livelihood." The memo also reveals that "The new Agency is organized and contracted."

On July 28, 1972, Crown Associates of St. Louis, Inc., was formed by Klostermeyer, Blair and Bradley. By resolution dated August 1, 1972, the officers of Crown Associates were authorized to contract with Crown for a new general agency. The agency agreement between Crown Associates of St. Louis, Inc., and Crown, under which Crown Associates was appointed general agent, shows execution by Klostermeyer on August 17, 1972, effective August 15, 1972, and Crown's executives are shown to have executed the agreement September 28, 1972. However, by memorandum dated August 9, 1972, addressed to the president of Crown, with copies to principal Crown officers, Lloyd revealed that the new agency was "organized and contracted." An employee of the Salomon Agency, Karen Ameye Kokish, was hired by Klostermeyer to work for Crown Associates. All the collection fees that had previously gone to Salomon agencies were then being paid to Crown Associates.

Klostermeyer signed and caused to be filed a Federal Corporate Income Tax Return for the calendar year 1972 on behalf of Crown Associates of St. Louis, Inc., disclosing that the owner of at least 50% of the voting stock of Crown Associates was an

alien individual or foreign corporation, partnership, trust or association.

Salomon had maintained the records of his insurance clients for a period of 26 years in his possession. Much of the information contained on those records was personal data complied by Salomon at his own expense. These records were maintained for the benefit of Salomon and for the benefit of his clients. The records were not maintained to serve Crown and were not in fact required. Much of the information posted to these records was available to Crown within their own record keeping system, capable of duplication, and were described as agency records. The material information contained in these records was obtained initially by Salomon or his agents. During the course of a hearing which concluded on October 26, 1972, many records were delivered to Crown over which there was no dispute. Additional records were made available to Crown after the hearing. No demand, prior to suit, was made for the records.

After a trial without a jury which lasted seven days, and involved a great deal of oral testimony on many disputed facts, the parties submitted comprehensive briefs, proposed findings of fact and conclusions of law to the District Court. In awarding judgment against Crown, the District Court found that Crown conspired with plaintiff's employees to subvert a business relationship which had existed for 25 years, and further found that Crown injured the plaintiffs by its successful subversion of plaintiff Salomon's employees and agents prior to termination of the contract.

In the "Crown lawsuit," against Sidney Salomon, Jr., and Associates, Inc., and ICI, Crown claimed the right to records under a provision of the general agency agreement.

The Court denied judgment to Crown on the grounds, that:

1. The records were clearly not related to the business to be transacted under the general agency agreement between the parties.

2. All records sought related to the past and future business of defendant Salomon, and

3. Crown entered the court with unclean hands.

The Court of Appeals reversed the judgment in both cases on the grounds that the findings of fact made by the District Court were clearly erroneous.

Petitioners now come to this Court seeking a review of the Court of Appeals decision in light of the limited scope of review of findings of fact allowed by Rule 52(a) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals, in its opinion reversing the District Court's judgment, went beyond the role of a reviewing court in cases tried without a jury as set out in Rule 52(a) of the Federal Rules of Civil Procedure, because it did not construe the evidence in the light most favorable to the prevailing party below.

In the case of *Mears v. Olin*, 527 F.2d 1100, 1103 (8th Cir. 1975), the Court of Appeals, in construing the limitations placed upon it by Rule 52(a) F.R.C.P. stated:

> "We cannot review the case *de novo*. We view the evidence in the light most favorable to the prevailing party, and we cannot reverse the trial court unless we should find that its findings are clearly erroneous. We must bear in mind that the trial judge has had the better opportunity to weigh the credibility of the witnesses."

The rule stated in the *Mears* case clearly establishes the requirement that a determination that findings are clearly erroneous must be based upon an evaluation of the evidence viewed in a light most favorable to the prevailing party. The court cannot take a view of the evidence that is not favorable to the prevailing party and on that basis conclude that the trial court's findings are clearly erroneous. Such a view would violate the rule against *de novo* review by an appellate court. In *Lindsay v. McDonnell Douglas Aircraft Corporation*, 485 F.2d 1288, 1289 (8th Cir. 1973) the Court of Appeals stated:

> "An appellate court accepts the presumption that the District Court's factual findings are correct, and does not reevaluate the evidence nor substitute its judgment for the District Court's first-hand evaluation."

There are several places in the Court's opinion where it can be seen from the language used, without even comparing it to the record or the findings of the trial court, that the court did not operate under such a rule of law and clearly did not view the evidence in the light most favorable to the prevailing party.

On pages 6 and 7 of the opinion (App. A-6) the Court of Appeals discussed the testimony of Sidney Salomon, Jr. and Lee Kling regarding their discussions about the termination of the joint venture. The Court stated that the substance of their discussions was in dispute, but rather than taking the view most favorable to the plaintiffs, that nothing definite had been decided, which, as noted, is supported by the testimony of both Salomon and Kling, the Court adopted a view of the evidence supported by a memo written by Kling long before he testified by way of deposition. The Court also took note of the obviously hearsay testimony of Robert Klostermeyer and James Blair to support its conclusions that the joint venture was terminated by July 1, 1972. This reevaluation of disputed testimony is a clear invasion of the trial court's prerogative to evaluate the evidence and accept that which it deems to be credible, and reject that which is not deemed credible.

The Court of Appeals for the Eighth Circuit has long espoused the principle that a conclusion that a finding is clearly erroneous cannot be based upon the appellate court's independent evaluation of conflicting evidence.

> "The entire responsibility for deciding doubtful fact questions in a non-jury case should be, and we think it is, that of the District Court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in non-jury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the District Courts, and multiplies the number of appeals in such cases." *Pendergrass v. New York Life Ins. Co.*, 181 F.2d 136, 138 (8th Cir. 1950).

> ". . . a finding of fact made by the trial court on conflicting evidence cannot be said to be clearly erroneous." *Safety Motors v. Elk Horn Bank and Trust Co.*, 217 F.2d 517, 522 (8th Cir. 1954).

Although the Court of Appeals expended a great deal of verbiage citing the aforementioned principles, it still made its own evaluation of disputed and conflicting testimony in reaching its conclusion.

The Court of Appeals has used the conclusion that the joint venture was definitely terminated as a foundation for the remainder of its opinion, and led it to further *de novo* reevaluation of the evidence already weighed by the trial court.

On page 16 (App. A-16) of the Court's opinion it is noted that Salomon's lack of knowledge of the May, 1972 visit by David Williams to the office of the joint venture "could very well be attributed to his infrequent contact with those offices and with the brokers during the time in question." Such speculative statements are a clear indication that the Court was not viewing the evidence in the light most favorable to the plaintiff, but had embarked upon a complete reevaluation of the record.

On page 18 (App. A-18) of the opinion the Court in discussing the contacts between Lloyd and Klostermeyer stated:

> "It is our view that these contacts were part of an overall course of conduct by Crown during this period that was justifiable as an effort to protect its valid economic interests in maintaining a viable insurance agency in St. Louis."

This language, on its face, shows that the court viewed the evidence in a light more favorable to the defendant-appellant

rather than in favor of the plaintiff-appellee as it was required to do by its own interpretation of Rule 52(a).

On page 17 (App. A-17) of the opinion in its discussion of the finding that Clark Lloyd made his decision to terminate the Salomon Agency on July 6, 1972, the Court stated:

> "The only *credible* evidence in the record on this specific factual finding is the testimony of Clark Lloyd in which he indicates that he was informed by Williams on July 6 via a long distance telephone call that the joint venture in St. Louis had been terminated. The court's statement regarding Lloyd's decision to terminate the joint venture general agency on that date wholly disregards this testimony and places an entirely different emphasis on the facts that exist in the record." (emphasis added)

In this statement the court openly states that it is ignoring the trial court's prerogative to judge the credibility of witnesses and making its own determination of what evidence is credible. The trial court cannot be faulted for disregarding testimony, because the very essence of the function of the trial court sitting without a jury is to weigh the testimony and disregard that which it determines not to be credible. It is not error to place a particular emphasis on facts just because the appellate court would place the emphasis on different facts.

The above quoted language is a clear indication of the departure of the Court from the letter, spirit and express purpose of Rule 52(a) as it has been construed by this Court.

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969).

The portions of the opinion noted above clearly indicate that the court did not review the evidence in the light most favorable to the prevailing party but instead embarked upon a complete *de novo* review of the evidence as it appeared in the cold record and disregarded the findings of the trial court which were made with the benefit of being able to observe the witnesses, and evaluate their credibility first hand. This first hand evaluation of the credibility of witnesses is especially important where, as here, the questions of motive, design and intent are crucial issues. This Court, in the case of *United States v. Yellow Cab Co.*, 338 U.S. 338, 70 S.Ct. 177 (1949), stated,

> "Findings as to design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." 338 U.S. at 341.

Clearly the Court of Appeals failed to heed this admonition.

The Court of Appeals failed to abide by its own principle, enunciated by Judge Sanborn in *Pendergrass v. New York Life Insurance Co.*, supra at 138:

> "Whether a reviewing court thinks that it would or might have made different findings of fact or have entered a different judgment had it been the trier of facts, is a matter of no consequence. On review this court should refrain from exercising any of the trial functions conferred by law upon the district courts."

There are several portions of the Court's opinion that are in such direct conflict with the trial court's findings of fact that they indicate that the Court has merely substituted its own evaluation of the evidence for that of the trial court which is properly charged with primary duty of evaluating the evidence.

On page 8 (App. A-7) of the Court of Appeal's opinion there is reference made to the fact that Klostermeyer directed Bradley to begin looking for office space for the "tentative" new general agency. The District Court made a finding (No. 12) that Klostermeyer instructed Bradley to search for office space for the new St. Louis Agency of Crown Insurance Company. The insertion of the word "tentative" places a different emphasis on the evidence and is an indication that the Court of Appeals made its own evaluation of the evidence on this point without the deference that is due the trial court's findings.

The discussion of the July 24, 1972 meeting between Lloyd and Salomon at page 9 (App. A-8) of the Court of Appeal's opinion shows a distinctly different slant than the finding (No. 13) of the District Court on the same subject. It is clear that Court of Appeals disregarded much of the evidence of what transpired at that meeting which if viewed in the light most favorable to the prevailing party would give a much different picture of what was discussed. The Court of Appeals mentions only demands made by Salomon, and the District Court made a finding about offers made by Lloyd. Such a divergent conclusion could not have come from view of all the evidence with due deference given to the District Court's evaluation.

The District Court stated in its general findings of fact that the evidence of Crown offered to counter the claims of plaintiffs was simply not credible. It is clearly within the province of the trial court to reject any evidence that it does not deem to be credible. *United States v. Yellow Cab Co.*, supra. Under Rule 52(a) it is not the role of the appellate court to reevaluate the evidence on the issue of credibility, yet in several instances the Court of Appeals has done so in its opinion.

The most obvious example is the statement on page 17 (App A-17) which was discussed above regarding Lloyd's determination to terminate the Salomon agency made on July 6, 1972,

in which the Court of Appeals patently stated its reevaluation of the credibility of Lloyd's testimony.

In addition at page 8 (App. A-8) of the opinion of the Court noted the disputed testimony regarding the July 6, telephone call from Ruth Hall to David Williams, and referred to the testimony of Klostermeyer which disputed Hall's testimony.

The testimony of Klostermeyer and Blair noted at page 7 (App. A-7) and also discussed above fits into the category of testimony which could properly be rejected by the District Court if in that court's evaluation it was not credible.

The above references clearly show that the Court of Appeals made its determination that the District Court's findings were clearly erroneous, not on a view of the evidence which would be most favorable to the prevailing party, but on a view of the evidence derived from a *de novo* evaluation.

II

The Court of Appeals has gone beyond the role assigned to it by Rule 52(a) by making new and contradictory findings of fact rather than limiting itself to a review of the findings of the District Court. Many of these findings are contrary to findings of the District Court which were supported by evidence, and give the distinct impression that the Court of Appeals did not view the evidence in the light most favorable to the prevailing party.

Many of the obviously new findings of fact have been discussed above. There are two new findings that clearly indicate that the Court of Appeals ignored its role as an appellate body and acted as a fact-finder substituting its view of the evidence for that of the District Court without viewing that evidence in the light most favorable to the prevailing party.

The Court of Appeals has taken the view of the evidence that the actions of Klostermeyer and Blair and Bradley acting at the direction of Klostermeyer were not encouraged, enticed or solicited by Crown, but were merely the actions of three men planning for the future. While it is true that the three were not named as defendants, the timing and tenor of their activities is evidence that Crown was more involved with these activities than the Court of Appeals chose to recognize.

The District Court viewed the evidence of these activities and drew reasonable inferences therefrom which is that court's proper function. The fact that Klostermeyer contacted Bradley almost immediately after his meeting with Crown officials in Toronto and directed him to look for office space for the new agency is certainly supportive of the reasonable inference that Klostermeyer had been given a strong indication if not an assurance by Crown officials that he would be given the lead in creating a new agency. This evidence also supports the reasonable inference that Crown had indicated to Klostermeyer that Sidney Salomon, Jr. would not be a primary factor in the new agency. The same inference is also supported by the fact that a new corporation entitled Crown Associates of St. Louis, Inc. was formed on July 28, 1972 by Klostermeyer, Blair and Bradley. The trial court could reasonably infer from the timing of this action and the fact that the word "Crown" appeared in the name of the corporation that this was not done on a mere hope that Crown might consider the new corporation for its general agency in St. Louis. This is further supported by the fact that on August 1, 1972 the three incorporators voted themselves salaries from the new corporation. One additional point in the evidence from which the District Court could reasonably infer that the new agency had a firm commitment from Crown is the final statement in the interoffice memo from Lloyd to R. C. Dowsett dated August 9, 1972, introduced as Exhibit 63 at trial, which states: "The new agency is organized and *contracted*." (Emphasis added)

Another point upon which the Court of Appeals substituted its evaluation of the evidence for the reasonable inferences drawn by the District Court was the question of when the officials of Crown decided to terminate the Salomon agency. The Court of Appeals made a finding of fact that this was not done until after the July 24 meeting between Lloyd and Salomon. The District Court, however, made a reasonable finding that the determination was made on July 6, 1972. This fact is important in determining whether or not Lloyd's meeting with Salomon on July 24 was really a good faith effort to work out some kind of an arrangement with Salomon or a mere sham designed to conceal what was really happening. The confidential memorandum dated July 12, 1972 from R. C. Dowsett to Lloyd introduced as Exhibit 66 at trial, is a clear indication that the decision was made prior to that date and would certainly support the District Court's findings that the decision to terminate Salomon was made well in advance of July 24. The language of the memorandum clearly indicates that the Crown officials had made a definite decision that there would be a new general agency in St. Louis with Klostermeyer and Blair as the key personnel in the agency. This memorandum which completely refutes the position taken by Crown on this point was disregarded by the Court of Appeals but certainly supports the reasonable inferences of the District Court. It is extremely difficult to see how the Court of Appeals could disregard this evidence and state in their opinion that the only credible evidence on this point was the testimony of Lloyd which was obviously self-serving.

The two points discussed above are the clearest indication that the Court of Appeals has not reviewed the findings of the trial court in light of the evidence most favorable to the prevailing party but instead has embarked on a *de novo* review of the evidence and merely substituted its inferences for those of the District Court. Such a review is clearly beyond the scope of Rule 52(a).

III

While the scope of review on questions of law is broader than that where the issues are factual, the views and interpretations of the trial judge are still entitled to some deference, especially when it is a question involving the law of the state in which the trial judge is sitting. On this point the Court of Appeals has stated:

> "We give to the opinion of a trial judge on questions involving interpretation of the law of his own state great deference." *Cousin v. Cousin*, 192 F.2d 377, 387 (8th Cir. 1951).

In the case of *Weiby v. Farmers Mutual Automobile Insurance Co.*, 273 F.2d 327, 331 (8th Cir. 1960), the Court stated:

> "Upon review of a judgment in a diversity case governed by state law, this court will accept the considered view of a trial judge as to the applicable law of his state unless convinced of error."

The District Court in this case concluded that Crown had committed an actionable wrong under Missouri Law when it tortiously interfered with the business relationship that existed between plaintiffs and three of their employees.

The Court of Appeals in an attempt to show justification for Crown's actions stated at page 13 of its opinion:

> "Missouri law provides that employees whose contracts are terminable at will have the right to terminate their employment for the purpose of *competing* with their employer. Additionally, they are allowed to plan and prepare for this *competitive* enterprise prior to their termination without revealing their plans to the employer. *See Thau-Nolde, Inc. v. Krause Dental Supply and Gold Co.*, 518 S.W. 2d 5. 9-10 (Mo. 1974); *National Rejectors,*

> *Inc. v. Trieman*, 409 S.W. 2d 1, 26 (Mo. 1966)." (Emphasis added.)

The rule derived from the *Thau-Nolde* and *National Rejectors* cases are not dispositive of the questions presented in this case. There was no evidence in the record nor did the Court of Appeals refer to any evidence that the purpose of the activities engaged in by Crown, Klostermeyer, Blair and Bradley was aimed at setting up an enterprise to merely compete with Salomon but rather those activities were intended to, and in fact did, eliminate Salomon as a Crown Agent and take over the Crown Agency and its business which Salomon had established and nurtured for some 26 years. It was not, therefore, erroneous for the District Court to conclude that the actions of Crown were tortious, for they were not the permissable actions of a competitor seeking to enhance his competitive position relative to the person whose employees he was recruiting.

While it is true, as noted above, that an appellate court has more leeway in reviewing conclusions of law, where the appellate court's conclusion is based solely on an exceedingly broad re-writing of the findings of fact, the review of the legal issues can be no stronger than the weak procedural foundation upon which they are laid. The review of legal issues in light of the de novo review of the facts completely negates and disregards the function of the District Court.

The points discussed above relate to those portions of the Court of Appeals opinion which is addressed to the main action by the Salomon plaintiffs against Crown Life, (No. 75-1537 below). Because the Court of Appeals changed all the findings of fact in that case, it reversed the District Court's conclusion that Crown was not entitled to injunctive relief because it had come into court with unclean hands in the suit by Crown against the Salomon Agency (No. 75-1538 below). Therefore, any review of the former action will necessitate a review of the latter because the factual issues are basically the same.

CONCLUSION

The record in the District Court was enormous, involving thousands of pages of testimony and hundreds, perhaps thousands, of pages of exhibits. It is astonishing to find an appellate court, at best confined to personal reading of this record in its entirety, embarking on a fact finding mission involving the judicial rehabilitation of testimony discarded by the trial court as not credible and the rejection of or the ignoring of all of the evidence persuasive to the trial court, and favorable to the petitioners, in its effort to sustain a conclusion which completely repudiates the validity and the purpose of the long and complex proceedings before the District Court. The rejection of the trial court here is unwise, unwarranted and cannot be supported through any review of the record which is either scholarly or fair.

The District Court's opportunity to view the witnesses first hand and assess their credibility is especially important in a case such as this where so few of those witnesses were unbiased or impartial. That the Court of Appeals took it upon itself to exactly reverse the assessment of the credibility of the witnesses in a complete repudiation of the District Court certainly makes this a proper case for a writ of certiorari as it involves issues of significant importance not just to these litigants but to the maintenance and preservation of the proper roles of courts existing within the structure of the federal judiciary. These cases fall squarely within the purview of Rule 19-1(b) of the Rules of this Court because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

A review of the opinions filed by the Court of Appeals deciding cases appealed from the Eastern District of Missouri in the past 14 months indicates that 32% of the civil cases have been reversed. The Report of Administrative Office of United

States Courts shows that in fiscal year 1975 only 19.3% of the United States civil cases and 18.6% of the private civil cases appealed from all Districts were reversed or dismissed. This fact coupled with the clear example of improper *de novo* review in this case, indicates a need for this Court to exercise its supervisory powers.

Wherefore, for the reasons stated a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 75-1537
Sidney Salomon, Jr., et al.,
Appellee,
v.
Crown Life Insurance Company,
Appellant.

No. 75-1538
Crown Life Insurance Company,
Appellant,
v.
Sidney Salomon, Jr. & Associates, Inc., et al.,
Appellees.

No. 75-1544
Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Portnoy-Tessler & Associates, Inc.,
Appellant,
v.
Crown Life Insurance Company,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri

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Submitted: March 8, 1976

Filed: June 23, 1976

Before LAY, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The central issue on these combined appeals concerns a claim of tortious interference with contractual and business relations under Missouri law. The district court,[1] sitting without a jury in this diversity case, found that Crown Life Insurance Company (Crown), a Canadian corporation doing business in Missouri, had tortiously interfered with certain contractual relationships between Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates), (Salomon Associates), an insurance broker and general agent for Crown, and three of their employees by conspiring with these employees while they were in Salomon Associates' employ to terminate their contractual and employment relationship with Salomon Associates and to set up a superseding insurance agency to act as general agent for Crown in Missouri. *Salomon v. Crown Life Insurance Co.*, 399 F. Supp. 93 (E.D. Mo. 1975). A judgment of approximately $900,000 actual damages and $750,000 punitive damages was entered by the court against Crown. The district court denied any relief on a similar claim of tortious interference brought by intervenor Portnoy-Tessler & Associates, Inc. Crown's action for the recovery of certain insurance records from the joint venture involving the Salomon appellees was denied.

We reverse the district court's damage award, having concluded upon the record that plaintiff has failed to establish its claim of tortious interference under Missouri law. We also reverse the trial court's denial of Crown's demand for the insurance records kept by the joint venture. The district court's denial of relief to intervenor Portnoy-Tessler & Associates, Inc. is affirmed.

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[1] The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

I

Our disposition of the tortious interference claim against Crown is based upon our firm conviction after a review of the entire record that a mistake has been committed. We are, of course, guided by the well established proposition that as an appellate court we must take that view of the evidence and accept such reasonable inferences therefrom as tend to support the trial court's conclusions. *See Lindsay v. McDonnell Douglas Aircraft Corp.*, 485 F.2d 1288, 1289 (8th Cir. 1973); *Higgins v. Kitterman*, 257 F.2d 861, 866 (8th Cir. 1958). Extensive specific reference will be made to that record throughout this opinion. However, at the outset we shall provide as a background a summary of the relevant facts and the procedural history of this litigation.

Appellant Crown Life Insurance Company is a Canadian corporation which has, since 1946, been engaged in the sale of life insurance in the greater St. Louis area. Appellee Sidney Salomon originally became a general agent for Crown in 1946. His business relationship with Crown continued until August 9, 1972, at which time Crown terminated the general agency with which he had been most recently associated. Salomon's business relationship with Crown during that 26 year period took a number of different corporate and business forms. From 1946 to 1949 a company which Salomon owned jointly with appellant Joyce Portnoy was the sole Crown general agent in St. Louis. In 1949, Robert Hannegan became a party to a new general agency contract with Crown in conjunction with Salomon and Portnoy. That general agency contract was in effect until 1957, at which time Crown entered into two separate general agency contracts, one with appellant Sidney Salomon, Jr. & Associates (Salomon Associates), the other with appellant Portnoy-Tessler & Associates, Inc.

On May 15, 1971, a joint venture under the name Sidney Salomon, Jr. Life Assurance Agency was formed between Salo-

mon Associates and Insurance Consultants, Inc. (ICI), for the purpose of representing Crown under a general agency contract. The prior general agency contract between Salomon Associates and Crown was terminated voluntarily by Sidney Salomon that same year. The general agency contract issued to the joint venture was officially terminated by Crown on August 9, 1972, under the 30 day notice provisions of the contract. That action precipitated this lawsuit.

During the course of the Salomon-Crown relationship, Sidney Salomon, Jr. was involved in a wide range of activities in addition to the sale of life insurance. At various times he owned interests in three baseball teams including the St. Louis Cardinals. From 1967 to the present time he has been chairman of the board of the St. Louis Blues hockey team. Salomon has also been an active participant in Democratic party politics. He has served as national treasurer and as a national committeeman for Missouri. In addition, Salomon owns a hotel in Miami, commercial property in St. Louis, and a farm in Missouri where he is personally involved in the breeding and raising of show horses.

Salomon asserts that all of these activities contributed to his considerable success as a life insurance agent inasmuch as he employs a "center of influence" approach to the sale of insurance. This theory is based upon the concept that insurance sales will be enhanced by activities which not only bring the agent in contact with a broad spectrum of influential people, but also make the purchase of insurance from that agent more attractive and advantageous. Through the use of this method, Salomon became a top producer for Crown. Over the years, the corporate entities with which he was associated received numerous commendations from Crown for their sales efforts.

One aspect of Salomon's approach to the sale of life insurance involved the recruiting of brokers to be trained at Salomon's expense for the purpose of handling the business that Salomon attracted. Two such men were James T. Blair III

and Robert Klostermeyer. They began working for Salomon in 1957 and 1961 respectively. After their training period, each man became a broker for the successive general agencies in which Salomon had an interest. Once trained, their primary compensation derived from commissions earned on the sale of life insurance policies. These two men, along with W. Andrew Bradley, became the focal point of the controversy between Salomon and Crown which arose in the summer of 1972.

In 1970, Salomon Associates, a general agent for Crown at that time, moved its business offices into the general headquarters of ICI, a large insurance brokerage in St. Louis County, Missouri. Salomon maintained an office at ICI but, as the record reveals, he spent the majority of his time at his office in the Arena, a sports complex which he owned and which was used by the St. Louis Blues hockey club.

In the spring of 1971, Salomon Associates and ICI entered into a joint venture for the purpose of representing Crown as general agent under the name Sidney Salomon, Jr. Life Assurance Agency. Under the joint venture agreement, ICI was managing partner of the enterprise and provided it office space within its general headquarters. Profits were to be shared equally after ICI's initial $20,000 capital investment was recouped.

By mid-April 1971, the joint venture had been approved by the respective boards of directors and shareholders. Blair, Klostermeyer and Bradley became brokers for the joint venture. In addition, Klostermeyer served as business manager and Bradley as bookkeeper and cashier. Brokers contracts were issued accordingly, appointing these men as brokers for the general agent, the joint venture doing business as Sidney Salomon, Jr. Life Assurance Agency.

Crown was initially informed of the creation of the joint venture in May 1971. The general agency contract to the joint venture by Crown was dated September 13, 1971. The prior

general agency contract with Salomon Associates had been cancelled on July 26, 1971, pursuant to a letter requesting such cancellation by Sidney Salomon, Jr.

By June 30, 1972, little more than a year after its creation, the joint venture had lost about $35,000. At about this time, Sidney Salomon, Jr. and ICI President Lee Kling met to discuss the future of the joint venture. What was decided as a result of these discussions is in dispute. Sidney Salomon, Jr. contends that he and Kling decided to "make some different arrangements" in order to "let him operate his ICI operations [and] I would operate my operations." According to Salomon's testimony, Kling gave him "carte blanche to do anything I wanted to do," including seeking separate general agency contracts with Crown for ICI and Salomon Associates. Salomon indicated that future plans with regard to the employment of Klostermeyer, Blair and Bradley were not discussed. Kling's deposition testimony[2] indicates that he and Salomon agreed to financially bifurcate the operations of the joint venture pending approval of two separate general agencies by Crown. However, a memorandum circulated by Kling among ICI personnel shortly after this meeting stated flatly: "Effective July 1st, Insurance Consultants will take over the complete management and operation of the Joint Venture life insurance agency. The profit and loss of same will be the 100% responsibility of Insurance Consultants."

On July 5, 1972, joint venture business manager Klostermeyer, at the invitation of Crown, traveled to the Toronto home offices of Crown for a series of meetings with various officers. Just prior to his departure from St. Louis, Klostermeyer was called into Kling's office and informed of the discussions he had had with Salomon with regard to the termination of the joint

[2] The trial court indicated that the deposition testimony was clearly admissible in the lawsuit against the joint venture and reserved ruling as to its admissibility against Salomon Associates.

venture. Kling testified that he informed Klostermeyer as to the substance of the memorandum he had prepared outlining the changes in the joint venture, including the fact that Klostermeyer would no longer be on salary from the joint venture, but would instead receive a commission on the life insurance placed by all ICI brokers. He wanted Klostermeyer to be informed as to the situation so that he would not be caught unaware if the subject came up while he was in Toronto. Kling did not remember whether he told Klostermeyer that all these changes were contingent upon Crown's approval. Klostermeyer's testimony basically confirms Kling. He stated that Kling informed him that the joint venture was terminated, that he had been fired as business manager of the joint venture, and that he could continue to work for ICI on a commission basis. Blair testified that Kling told him on that same day that "Sid [Salomon] wants out and we're going to take over the operation of the life insurance business."

Upon arrival in Toronto, Klostermeyer informed Crown officials that the Salomon Associates-ICI joint venture had been terminated by agreement of the parties. He stated that the source for this information was ICI President Kling. During the course of these conversations, Klostermeyer indicated that he was interested in participating in whatever new general agency setup Crown arranged in St. Louis to supersede the reportedly defunct joint venture. On or about July 7, 1972, Klostermeyer contacted Blair and Bradley to determine whether they would be interested in applying for a new general agency contract with Crown in St. Louis. Shortly thereafter, Klostermeyer directed Bradley to begin looking for office space to house the tentative new general agency.

There is evidence in the record as to three significant phone conversations in July between Crown officials and Miss Ruth Hall, Salomon's private secretary and assistant, which are related to the tortious interference claim. On July 6, Hall called

Mr. David Williams, a Crown official in Toronto, and informed him that both Salomon and ICI wanted general agency contracts. Later that day Williams informed Hall by telephone that ICI would not be given a contract. According to Hall's testimony, Williams also stated that "Sidney could always have one." Klostermeyer, who was in Williams' office during both phone conversations with Hall, testified he heard no such remark by Williams. Williams' deposition indicates that Miss Hall informed him during the initial telephone conversation that the joint venture had been terminated, that two general agency contracts were requested and that the brokers formerly with Salomon would probably be working with ICI. Subsequently, on or about July 11, 1972, Miss Hall spoke by telephone with William Bowden of Crown and relayed the message that Salomon, in the face of Crown's refusal to grant a general agency contract to ICI, would give ICI a sub-general agency contract under his contract. Hall stated that Bowden replied "that was different from what I heard" but did not elaborate.

On July 24, 1972, Clarke Lloyd, Crown's senior vice president for United States agencies, conferred with Sidney Salomon, Jr. in Salomon's St. Louis Arena offices. Notes made during that meeting indicate that these men discussed Salomon's future with Crown. It is apparent from these notes that no final accord was reached at that time. A number of different corporate and financial configurations involving Crown and Salomon were suggested during the course of the all-day meeting. However, Salomon indicated that his post-joint venture relationship with Crown was contingent upon the formation of a new general agency in St. Louis bearing his name and with him as president. Salomon stated that he would invest no capital in the agency nor would he be responsible for its management. But, he wanted to receive 25% of the gross profits in addition to retaining his full renewal commissions and collection fees. These terms were to be relayed by Lloyd to the Crown home office for consideration.

Following this meeting, there is evidence that the Crown officials discussed Salomon's demands and determined that they did not wish to comply with them. The role to be played by Sidney Salomon in any future Crown general agency in St. Louis was left to be determined by Klostermeyer as the primary moving force in a new general agency. Klostermeyer ultimately rejected the terms upon which Salomon conditioned his continuing association with Crown.

On July 28, 1972, Klostermeyer, Blair and Bradley incorporated Crown Associates of St. Louis, Inc., the eventual recipient of a general agency contract from Crown. On August 9, 1972, Crown sent letters of termination to the joint venture addressed to the Sidney Salomon Life Assurance Agency. The general agency contract between Crown and the joint venture was terminable upon 30 days notice by either party. A similar letter of termination was sent to appellant Portnoy-Tessler & Associates, Inc. Crown Associates of St. Louis, Inc. was appointed general agent for Crown on September 28, 1972. That contract made the appointment retroactively effective to August 15, 1972. Despite the termination, Sidney Salomon continues to receive certain vested renewal commissions from Crown.

This action was commenced by the Salomon appellees in September of 1972. The matter came on for trial by the court in October 1974. Orders and a memorandum were filed on March 4, 1975, awarding Sidney Salomon & Associates a judgment against Crown in the amount of $894,784.44 actual damages, and $750,000 punitive damages. Judgment was entered for Crown against intervenor Portnoy-Tessler & Associates, Inc. These appeals followed.

II

In this diversity case we are, of course, applying the substantive law of Missouri. The theory of recovery in the instant case is based upon tortious interference with contractual or business

relations. In order to establish a claim of tortious interference under Missouri law, the following elements must be established:

(1) A contract or a valid business relationship or expectancy (not necessarily a contract);

(2) Defendant's knowledge of the contract or relationship;

(3) Intentional interference by the defendant inducing or causing a breach of the contract or relationship;

(4) The absence of justification; and,

(5) Damages resulting from defendant's conduct.

See Harber v. Ohio Nat'l Life Insurance Co., 390 F. Supp. 678, 683 (E.D. Mo. 1974), *aff'd*, 512 F.2d 170 (8th Cir. 1975). *See also Clark-Lami, Inc. v. Cord*, 440 S.W.2d 737, 741 (Mo. 1969); *Downey v. United Weather Proofing, Inc.*, 253 S.W.2d 976 (Mo. 1953).

The essence of the district court's finding that Crown was liable to Salomon for tortious interference with his contractual or business relations is as follows:

> It is obvious to the Court that defendant Crown conspired with certain of plaintiffs Salomon's employees to end the relationship which had existed between the parties for a number of years. Such a termination is certainly not wrong, and was well within the rights of defendant Crown, however, defendant Crown injured the plaintiffs Salomon by its successful subversion of plaintiff Salomon's employees and agents prior to the termination of the contract. Such subversion clearly constituted what this Court feels is a tortious interference with contractual relationships. The overall demeanor of the defendant Crown in this matter was one of underhanded and deceptive dealing. It must be noted that the Court finds no wrong in terminating the contract between the parties, the Court finds the wrong in the defendant Crown's dealing with plaintiffs Salomon's agents before the termination of the contractual relationship.

399 F. Supp. at 99. Basically, the scope of our review in this appeal is confined to that general finding and the various specific findings of fact that relate to it.

The standard of review to which we adhere in evaluating the district court's findings of fact is well established.

> Our review is limited by Rule 52(a), Federal Rules of Civil Procedure. We cannot review the case *de novo*. We view the evidence in the light most favorable to the prevailing party, and we cannot reverse the trial court unless we should find that its findings are clearly erroneous.

Mears v. Olin, 527 F.2d 1100, 1103 (8th Cir. 1975). In addition, as this court stated in *Cole v. Neaf*, 334 F.2d 326, 329 (8th Cir. 1964):

> We have repeatedly and consistently held, at least subsequent to the Supreme Court's decision in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 291, 80 S.Ct. 1190, 4 L.Ed.2d 1218, that the clearly erroneous standard applies to reasonable inferences to be drawn from stipulated or undisputed facts and that it is for the trial court rather than this court to draw legitimate and permissible inferences.

(Citations omitted.) *See Jarvis v. Montgomery Ward and Co.*, 525 F.2d 1267 (8th Cir. 1975); *Moorhead Construction Co. v. City of Grand Forks*, 508 F.2d 1008, 1012 (8th Cir. 1975); *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153, 156 (8th Cir. 1973); *Jackson v. Hartford Accident and Indemnity Co.*, 422 F.2d 1272 (8th Cir.), *cert. denied*, 400 U.S. 855 (1970). Further, we recognize that

> the complaining party has the burden to clearly demonstrate error in the court's findings. This is a strong burden

> where, as here, the findings are primarily based upon oral testimony and the trial judge has viewed the demeanor and credibility of witnesses. Chalk v. Beto, 429 F.2d 225, 227 (5th Cir. 1970); St. Louis Typographical Union No. 8 v. Herald Company, 402 F.2d 553, 557 (8th Cir. 1968), and cases cited therein.

Snodgrass v. Nelson, 503 F.2d 94, 96 (8th Cir. 1974).

Nevertheless, our careful analysis of the entire record in light of these standards leaves us "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Zenith Corp. v. Hazeltine*, 395 U.S. 100 (1969); *Smith v. Anchor Building Corp.*, No. 75-1554 (8th Cir., May 13, 1976); *Birdwell v. Hazelwood School District*, 491 F.2d 490, 494 (8th Cir. 1974). The district court's finding that the requisite elements of tortious interference by Crown were established in the instant case is clearly erroneous.

III

Before analyzing the district court findings that specifically relate to the elements of a cause of action for tortious interference, it is essential that we carefully define the scope of our inquiry so as to eliminate any consideration of irrelevant facts which may tend to color the issues herein involved. The sole contention by the Salomon appellees is that Crown wrongfully conspired with Klostermeyer, Blair and Bradley to terminate their relationship with Salomon and set up a superseding insurance agency, thus interfering with and inducing a breach of his contractual and business relations with these employees. No claim has been made with regard to any wrongful termination by Crown of the general agency contract held by the joint venture doing business as Sidney Salomon, Jr. Life Assurance Agency. The district court specifically found that such

termination was valid under the terms of the contract. 399 F. Supp. at 99. That finding is clearly established.

Further, although Klostermeyer, Blair and Bradley are alleged to have wrongfully conspired with Crown, they are not made defendants in this suit. Thus, evidence of any bad faith or malice toward Salomon by them, including their personal desire to become general agents for Crown, cannot be imputed to Crown unless the existence of some wrongful act done by Crown for the purpose of injuring Salomon is demonstrated. Missouri law provides that employees whose contracts are terminable at will have the right to terminate their employment for the purpose of competing with their employer. Additionally, they are allowed to plan and prepare for this competitive enterprise prior to their termination without revealing their plans to the employer. *See Thau-Nolde, Inc. v. Krause Dental Supply and Gold Co.*, 518 S.W.2d 5, 9-10 (Mo. 1974); *National Rejectors, Inc. v. Trieman*, 490 S.W.2d 1, 26 (Mo. 1966). *See generally Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F.2d 910 (8th Cir. 1976); *Metal Lubricants Co. v. Engineered Lubricants Co.*, 411 F.2d 426, 428-30 (8th Cir. 1969); *Motorola, Inc. v. Fairchild Camera and Instrument Corp.*, 366 F. Supp. 1173, 1180-81 (D. Ariz. 1973). Likewise, an employer may offer employment to such applicants if legal and proper means are used in acquiring their services. *National Rejectors, supra*, 409 S.W.2d at 34.

In *Metal Lubricants Co. v. Engineered Lubricants Co., supra*, 411 F.2d at 429, this court observed:

> As noted by the Missouri Supreme Court, we are dealing with two conflicting public policies. One policy seeks to protect a business from unfair competition. The other policy favors free competition in the economic sphere. The court explained:
>
> > " 'It is necessary that there be a balancing of the equities between these two rights, for if the former

is carried to its extreme it will deprive a man of his right to earn a living; while conversely, the latter right if unchecked, would probably make a mockery of the fiduciary concept, with its concomitants of loyalty and fair play.' Comment, The Obligation of a High-Level Employee to his Former Employer: The Standard Brands Case, 29 University of Chicago Law Review 339, 351-352. See Wexler v. Greenberg, 399 Pa. 569, 160 A.2d 430. In that case the court stated (160 A.2d 435): 'Were we to measure the sentiment of the law by both English and American decisions in order to determine whether it favors protecting a businessman from certain forms of competition or protecting an individual in his unrestricted pursuit of a livelihood, the balance would heavily favor the latter.' " 409 S.W.2d at 39.

In this case, it is clear that Klostermeyer took the lead in attempting to create a new Crown general agency in St. Louis following the July termination of the joint venture. It is uncontroverted that Klostermeyer was responsible for recruiting Blair and Bradley and convincing them to join with him in the effort to obtain an agency contract. None of these acts by the three brokers constitute actionable wrongs. The only acts of relevance here are those of Crown. In this action the Salomon plaintiffs had the burden of proving something more than the fact that Klostermeyer, Blair and Bradley wanted to further their own post-joint venture economic livelihood by securing a general agency contract from Crown. It was incumbent upon the plaintiffs below to prove that Crown "maliciously or without justiable cause" induced the breach of the relationship between Salomon and his three brokers. Under applicable Missouri law, "[t]he term 'maliciously' in this connection alludes to malice in its technical legal sense, that is, the intentional doing of a harmful act without justification or excuse." *Downey v. United Weather Proofing, supra,* 253 S.W.

2d at 980. *Accord, Gerstner Electric, Inc. v. American Insurance Co.,* 520 F.2d 790, 794 (8th Cir. 1975); *Cady v. Hartford Accident and Indemnity Co.,* 439 S.W.2d 483, 485 (Mo. 1969).

We have found no evidence of malice on the part of Crown toward Salomon in this record. Nor have we been able to discern the existence of a conspiracy involving Crown for the purpose of wronging Salomon by attempting to subvert Salomon's brokers. The district court's findings to the contrary are clearly erroneous.

Specifically, the district court found that the conspiracy was furthered by the May 1972 visit to St. Louis by Crown officer David Williams. 399 F. Supp. at 96. This is the only finding of fact by the district court that charges Crown with private negotiations with the alleged conspirators preceding the disputed July 1 termination of the joint venture. However, the district court's basis for presuming a conspiratorial motive in this visit is unclear. The only evidence of the May visit to St. Louis by Williams is Williams' own deposition in which he states that he visited the agency as part of his routine duties as senior vice president for United States agencies.

Nevertheless, the district court's fact finding on this St. Louis visit by Williams indicates that it was the product of Bradley's "Trojan Horse" role.[3] We find no evidence to support this

[3] The district court found that W. Andrew Bradley was a "Trojan Horse" sent into the Salomon camp by Crown for the purpose of subverting the general agency relationship. This finding is clearly erroneous. Salomon testified that he requested of Crown executives the recommendation of a qualified individual "who could be a cashier, but could be trained to help with agency work and administrative work and to relieve the agency of that responsibility." Thereafter upon the recommendation of a Crown official, Salomon negotiated with and obtained the services of Bradley who began working for Salomon Associates in late 1970. Bradley had had experience in the office management and the administration of insurance business. Just prior to his employment by Salomon Associates Bradley was

conclusion. It appears that Williams' May 1972 visit was not known to Sidney Salomon, Jr. We do not discern conspiratorial inferences from this fact. Williams openly visited with the brokers at the joint venture's offices at ICI headquarters. Salomon's lack of knowledge could very well be attributed to his infrequent contact with those offices and with the brokers during the time in question.[4]

One product of the May visit by Williams was an invitation that Klostermeyer received to visit the Crown home office in Toronto. There is no evidence that this invitation was offered to Klostermeyer as part of any conspiracy. It was a restatement of an offer to visit the home offices which had been made to a number of Crown brokers in St. Louis the previous fall by W. N. Bowden, a Crown officer who had visited at that time. Brokers Pierce Liberman and Rod Susman had gone to Toronto pursuant to that invitation a few months prior to Klostermeyer's visit. Thus we find no basis for the district court's finding of a conspiratorial intent or a wrongful purpose in David Williams' May 1972 visit to St. Louis.

In addition, the district court found that Clarke Lloyd, an officer of Crown who was senior vice president for the United

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employed by Crown in one of its Toronto branches. There is absolutely no evidence to support the contention that Bradley was acting in concert with Crown against Salomon's interests. None of the evidence suggests any "Trojan Horse" role for Bradley, nor have we been able to discern any "camouflaged actions" by him. The reference to Bradley as an "insider" relates to the fact that he was in an office administration position within the agency as opposed to being a producer of insurance business. He served as cashier for the joint venture until its termination. After a short term as secretary-treasurer of the new agency he sold his stock and assumed the duties of cashier.

[4] Sidney Salomon, Jr. testified that he maintained an office at the ICI building but that he spent little time there. He felt that his Arena offices "had a little more glamor." Klostermeyer testified that he saw Salomon a total of three or four times during the year of the joint venture.

States agencies at that time, "made a determination to terminate the business relations" that had existed between Salomon and Crown as of July 6, 1972. 399 F. Supp. at 96. As a consequence of this finding, Lloyd's July 24, 1972, meeting with Salomon in St. Louis at which Salomon's future role with Crown was discussed would necessarily be interpreted as a sham and a coverup of the conspiracy. The only credible evidence in the record on this specific factual finding is the testimony of Clarke Lloyd in which he indicates that he was informed by Williams on July 6 via a long distance telephone call that the joint venture in St. Louis had been terminated. The court's statement regarding Lloyd's decision to terminate the joint venture general agency on that date wholly disregards this testimony and places an entirely different emphasis on the facts that exists in the record.

According to the evidence in the record on this point, the sole "determination" made by Clarke Lloyd on July 6 was that the joint venture had in effect resigned its general agency, "a determination" which prompted the conversation with Klostermeyer and the meeting with Salomon on July 24 at which possible new corporate formats were discussed. Mr. Lloyd's testimony at trial was that the decision to terminate the joint venture general agency was not made until after that meeting. The court's attribution to Lloyd of a decision to terminate Salomon as of July 6 suggests motives on Crown's part which are unsupported by the factual record.

Although we have found no evidence of a conspiracy between Crown and the brokers to wrong Salomon, there is evidence in this record suggesting contact between Crown and Klostermeyer, Blair and Bradley during the period following the July 24 meeting with Salomon in St. Louis and the August 9 termination letter. The substance of these contacts appears to have been related to the inclusion or non-inclusion of Sidney Salomon, Jr. in the proposed new general agency for St. Louis. In addition,

there is a suggestion in the record, based on inter-Crown memoranda, that limited discussions with Klostermeyer took place shortly after the Klostermeyer visit to Toronto in early July. Finally, Clarke Lloyd testified that he spoke on the telephone with Klostermeyer three or four times and with Bradley two or three times in the weeks between July 7 and August 9, 1972. It is our view that these contacts were part of an overall course of conduct by Crown during this period that was justifiable as an effort to protect its valid economic interests in maintaining a viable insurance agency in St. Louis.

Our examination of the record convinces us that the Salomon appellees failed to establish an absence of justification as required under the *Harber* formulation. *Harber, supra*, 390 F. Supp. at 683. *See also Gerstner Electric, Inc. v. American Insurance Co.*, 520 F.2d 790, 794 (8th Cir. 1975); *Harber, supra*, 512 F.2d at 175-76; *Cady v. Hartford Accident and Indemnity Co.*, 439 S.W.2d 483, 485 (Mo. 1969). *See generally Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F. 2d 910 (8th Cir. 1976). Justification for intentional interference such as is alleged in this case can be provided through proof that the efforts were undertaken to protect a valid economic interest. *Leo Speer Const. Co. v. Fidelity and Casualty Co.*, 446 F.2d 439, 445 (2d Cir. 1971); *Zoby v. American Fidelity Co.*, 242 F.2d 76, 79-80 (4th Cir. 1957). *See also Johnson v. McKee Baking Co.*, 398 F. Supp. 201, 207 (W.D. Va. 1975).

The Restatement of Torts states that liability for purposeful interference with business relations will arise unless a privilege to so act is shown. Of special relevance to the case before us is the following language from that Restatement section:

> The issue in each case is whether the actor's conduct is justifiable under the circumstances; whether, upon a consideration of the relative significance of the factors involved, his conduct should be permitted despite its expected effect of harm to another.

Comment a, Restatement of Torts § 767. This section was endorsed by the Missouri Supreme Court in *Downey v. United Weather Proofing, Inc.*, 253 S.W.2d 976, 982 (Mo. 1953). Applying these legal principles to the facts in the instant case convinces us that the district court's finding of a lack of justification for Crown's action was clearly erroneous.

On July 5, 1972, Crown officer David Williams was informed that its primary general agent in St. Louis, the joint venture between Salomon Associates and ICI doing business as Sidney Salomon, Jr. Life Assurance Agency, had in the words of one witness "resigned their contract." Crown had no reason to doubt the veracity of this information. It came from Robert Klostermeyer, the business manager of the joint venture and a long-time Crown broker who had announced to Williams that "the joint venture had broken up, had been dissolved" and that he was "out of a job." Further, Klostermeyer's source for this information was Lee Kling, president of ICI, the managing partner of the joint venture. Thus, as of July 5 Crown had discovered somewhat indirectly yet from credible sources that the joint venture acting as general agent in St. Louis had been terminated without its knowledge.

Crown's Williams received collateral substantiation of this development the next day in a phone call from Ruth Hall, secretary to Sidney Salomon, Jr. for a period of 27 years and a long-time acquaintance of many of the Crown officials. While the specific details of this conversation are in dispute, it is clear that Miss Hall informed Williams that both Salomon Associates and ICI were requesting general agency contracts from Crown. Given these facts, Crown's subsequent actions constituted in our view a rational response to an unexpected occurrence. Faced with the resignation of a major general agent in an important urban area, Crown reacted by discussing with Klostermeyer,

who had been known to Crown over a number of years, whether he would be interested in any future general agency arrangement in St. Louis. Following this initial contact, it was Klostermeyer, not Crown, who contacted Blair and Bradley for the purpose of enlisting their support. These facts demonstrate that as of July 5, 1972, Crown was operating under the reasonable assumption that the general agency contract with the joint venture was no longer valid and that Klostermeyer, Blair and Bradley were, in effect, free agents.

At the time when this first information relating to the breakup of the joint venture was relayed to Crown by Klostermeyer, the undisputed evidence reveals that Sidney Salomon, Jr. was in Miami, Florida, attending the Democratic National Convention as a delegate. On July 6, Clarke Lloyd attempted to reach Salomon at his hotel in Miami but was unsuccessful. As the result of a July 14, 1972, phone conversation between Clarke Lloyd and Ruth Hall, the meeting with Salomon in St. Louis was arranged for July 24, 1972.

Lloyd came to St. Louis for the July 24 meeting without preconceived notions as to what if any future Sidney Salomon, Jr. would have with Crown. The testimony of Lloyd and the deposition of David Williams indicate that Crown felt that the joint venture general agency contract was no longer valid. Inter-office memoranda circulated prior to the July 24 meeting indicate that Crown officials were considering a Salomon role in the formation of a new general agency to supplant the joint venture. These alternatives were discussed with Salomon on July 24. The result of these discussions was a list of demands by Salomon upon which his future relations with Crown would be conditioned. In effect, the proposed new agency would have Salomon as president receiving 25% of the profits plus all renewal commissions and collection fees on business written by the agencies with which he had been associated up to that time. Commenting on these demands, Lloyd stated that he, along with a number

of other Crown officials, felt that "Crown Life cannot sanction the arrangement as required by S. Salomon." The tenor of this August 9 memorandum clearly indicates that Lloyd went into the July 24 meeting in good faith for the purpose of resolving the situation that existed between Salomon and Crown Life as a result of the termination of the joint venture. While it is clear that Crown envisioned a new general agency, possibly involving Klostermeyer, Blair and Bradley, it is also clear that they anticipated a continuing role for Sidney Salomon, Jr. Salomon's demands made such a future relationship unworkable. But it was only after the July 24 meeting that Crown finally determined to appoint a new general agency in St. Louis that did not include the participation of Sidney Salomon, Jr.

We conclude that the district court was in error in finding that the facts of this case showed a lack of justification for Crown's actions. Further, we find no evidence of malice toward Salomon on this record. Instead, the facts reflect that Crown was motivated by a desire to protect its valid economic interests in the St. Louis market. It had reasonably concluded based upon the facts presented to it that the joint venture had resigned and that Klostermeyer, Blair and Bradley were not committed to Sidney Salomon, Jr. in any contractual or fiduciary sense. Even if it is assumed for the sake of argument that there is evidence to support the district court's findings that the other elements of the *Harber* test were satisfied, the factual record in this case as developed by the Salomon appellees does not show an absence of justification for the actions taken by Crown.[5]

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[5] In view of our finding that no liability was established on the tortious interference claim we do not reach the damage issue in this case. We note, however, that the Salomon appellees had the burden in the district court to prove some damage attributable to the wrong they suffered at the hands of Crown. The district court's finding was that Crown wrongfully subverted and brought about a breach in the relationship between Salomon and the three brokers. Thus, any showing of damage must necessarily arise from the loss occasioned by Crown's acts. However, the actual damage award by the district court relied exclusively upon expert testimony and economic

In summary, after extensive analysis of the entire record before the district court and with full realization that it is our duty on appeal to give great deference to the factual findings of the trial court, we conclude that no cause of action for tortious interference with contractual or business relations under Missouri law was established in the instant case. In reaching its decision to the contrary, the district court placed great reliance upon this court's decision in *Falstaff Brewing Corp. v. Iowa Fruit & Produce Co.*, 112 F.2d 101 (8th Cir. 1940). Such reliance was misplaced. In *Falstaff* the court found that the defendant brewer had wrongfully breached a non-cancellable distributorship contract which it held with the plaintiff and had established a rival beer distributorship run by three men who had formerly comprised plaintiff's entire sales staff. *Id.* at 107-08. Two actionable wrongs were found to have been committed by the defendant in *Falstaff*: the procuring of the breach of contract through conspiratorial means and the hiring of the plaintiff's employees in an attempt to ruin its business. It is the existence of these wrongful acts that completely distinguishes *Falstaff* from the instant case. In this record we have been able to find no wrongful act committed by Crown. *See Morton Buildings of Nebraska, Inc., supra*, 531 F.2d at 914-16. The district court conceded that the termination of the general agency contract was valid. Even if we assume a contractual or employment relationship between Salomon and the three brokers following the July 1 termination of the joint venture, Missouri law gave them the right to plan a competing enterprise while still under con-

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projections which were premised upon the continuation of the general agency contract over a period of 20 years. We find no basis for the use of such a standard. The use of the general agency contract as the basis for the damage award does not square with the district court's finding that the termination of that contract was in fact valid according to its terms. We also find no basis for the use of a 20 year period. It is undisputed that the general agency contract was terminable upon one month notice by either side. Further, ordinary renewal commissions are paid for a period of 10 years. Similarly, we find no basis whatsoever for the district court's award of $750,000 in punitive damages.

tract. The facts as they appeared to Crown during July and August of 1972 afforded it the privilege to negotiate with Klostermeyer, Blair and Bradley with a view toward a possible general agency contract in order to protect its economic interests in the St. Louis market. The evidence in this case reveals that both sides were guilty of inadequate communication, misunderstanding, and a lack of complete candor with each other. However, the record does not indicate the bad faith, malice, and wrongful conduct that is necessary to establish a cause of action for tortious interference with business or contractual relations.

IV

Two other issues were raised on this appeal which deserve only passing reference. Intervenor Portnoy-Tessler & Associates, Inc. brought a claim for tortious interference with contractual relations against Crown based upon the fact that its general agency contract with Crown was cancelled as a result of the same acts which led to the cancellation of the joint venture's general agency contract. The district court found that "plaintiff-intervenor has shown no damage arising out of the cause of action of plaintiffs Salomon against defendant Crown." As a result, relief was denied. We affirm that denial.

Further, appellants sought from the joint venture the return of certain business records which were said to relate to their life insurance business and which were properly returnable to them under the terms of the cancelled general agency contract. The district court found from the evidence adduced at trial that Crown had the records that it sought available to it within its own computer system and that those records were "easily obtainable through electronic data retrieval methods." This fact, coupled with the court's finding that Crown had "unclean hands," resulted in a denial of relief on that basis. We are con-

vinced from our examination of the record that the district court's finding of Crown's unclean hands is clearly erroneous. In addition, the fact that Crown may have the sought-after records within its computer banks is irrelevant. The general agency contract between Crown and the joint venture which the district court found to be validly terminated provided as follows:

> All records, letters or other documents relating to the business to be transacted under this Agreement shall be open to inspection by the Company at any time, and, at the termination of this Agreement, shall be turned over to the Company together with any other of the Company's property then in the General Agent's possession.

In view of this language and the district court's finding that the termination of the contract was valid, we find no basis for the denial of these records to Crown.

We hereby reverse the judgment entered against Crown that is before us in 75-1537 and remand the case for entry of judgment in favor of Crown on the Salomon appellees' claim of tortious interference. Further, we reverse the district court's determination in 75-1538 with regard to the records sought by Crown from the joint venture. We affirm the district court's judgment in 75-1544.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Crown Life Insurance Company,
a Corporation,
Plaintiff,

vs.

Sidney Salomon, Jr. & Associates, Inc.,
a Corporation,

and

Insurance Consultants, Inc., a Corporation, d/b/a "Sidney Salomon, Jr. Life Assurance Agency",
Defendants.

No. 72 C 582 (3)

ORDER

In accordance with the Memorandum of this Court filed this date in this action and incorporated herein,

It Is Hereby Ordered that the defendants, Sidney Salomon, Jr. & Associates, Inc., and Insurance Consultants, Inc., a corporation, d/b/a "Sidney Salomon, Jr. Life Assurance Agency", have judgment against the plaintiff, Crown Life Insurance Company; and

It Is Further Ordered that plaintiff, Crown Life Insurance Company, pay costs.

Dated this 4th day of March, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc., a Corporation, Plaintiffs, and Portnoy-Tessler & Associates, Inc., a Corporation, Plaintiff-Intervenor, vs. Crown Life Insurance Company, Defendant.	No. 72 C 547 (3)

ORDER

In accordance with the Memorandum of this Court filed this date in this action and incorporated herein,

It Is Hereby Ordered that the plaintiffs, Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc., a corporation, have judgment against the defendant, Crown Life Insurance Company, for the amount of Eight Hundred Ninety-Four Thousand, Seven Hundred Eighty-Four Dollars and Forty Four Cents ($894,784.44) as actual damages; and

It Is Further Ordered that the plaintiffs, Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc., a corporation, have judgment against the defendant, Crown Life Insurance Company, for the amount of Seven Hundred Fifty Thousand Dollars and No Cents ($750,000.00) as punitive damages; and

It Is Further Ordered that defendant, Crown Life Insurance Company, have judgment against plaintiff-intervenor, Portnoy-Tessler & Associates, Inc.; and

It Is Further Ordered that defendant, Crown Life Insurance Company, pay costs attributable to the action of plaintiffs, Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc.; and

It Is Further Ordered that plaintiff-intervenor, Portnoy-Tessler & Associates, Inc., shall pay costs for that portion of its claim against defendant, Crown Life Insurance Company.

Dated this 4th day of March, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc., a Corporation, Plaintiffs, and Portnoy-Tessler & Associates, Inc., a Corporation, Plaintiff-Intervenor, vs. Crown Life Insurance Company, Defendant.	No. 72 C 547 (3).
Crown Life Insurance Company, a Corporation, Plaintiff, vs. Sidney Salomon, Jr. & Associates, Inc., a Corporation, and Insurance Consultants, Inc., a Corporation, d/b/a "Sidney Salomon, Jr. Life Assurance Agency", Defendants.	No. 72 C 582 (3).

MEMORANDUM

This action is before the Court for a decision on the merits following the trial to the Court sitting without a jury.

Plaintiffs, Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc. (herein plaintiffs Salomon) initiated this action (No. 72 C 547 (3)) alleging tortious interference with business relations, and seeking to restrain and enjoin the defendant, Crown Life Insurance Company (herein defendant Crown), from using plaintiffs' Salomon's business records and for actual and punitive damages. In the related case (No. 72 C 582 (3)), plaintiff Crown seeks to require defendants Salomon and Insurance Consultants, Inc., d/b/a Sidney Salomon, Jr. Life Assurance Agency, to deliver certain records, to prohibit the use of said records, and damages.

Portnoy-Tessler & Associates, Inc. (herein Portnoy) was granted leave to intervene as party plaintiff in No. 72 C 547 (3).

The cases were consolidated and tried before this Court.

For the sake of simplicity, the Court's opinion will deal with the causes of action in three parts. The findings of fact and conclusions of law concerning Salomon and Crown in No. 72 C 547 (3) will be separately stated as will findings of fact and conclusions of law for Portnoy and defendant Crown. No. 72 C 582 (3) will be dealt with as a separate entity.

The Court being fully apprised of the premises hereby makes the following findings of fact and conclusions of law.

Findings of Fact

Sidney Salomon, Jr., et al.

vs.

Crown Life Insurance Company

No. 72 C 547(3)

1. This Court has jurisdiction over the subject matter of this suit and the parties hereto pursuant to 28 U.S.C. §1332.

2. Plaintiff, Sidney Salomon, Jr., is an individual residing in St. Louis County, Missouri, and plaintiff, Sidney Salomon, Jr. & Associates, Inc., is a corporation organized under the laws of the State of Missouri, having its principal place of business in St. Louis County, Missouri.

3. Defendant, Crown Life Insurance Company, is a life insurance company organized by an act of the Canadian Parliament, with the principal place of business in Toronto, Canada. Defendant Crown commenced the sale of life insurance in the State of Missouri in 1946.

4. At all times since 1946, plaintiff, Sidney Salomon, Jr., was a broker on behalf of Crown and operated a general insurance agency by appointment of Crown under the following legal entity names: Portnoy-Salomon and Company; Salomon, Hannegan, Portnoy & Associates, Inc.; Sidney Salomon, Jr. & Associates, Inc.; Sidney Salomon, Jr. Life Assurance Agency; a joint venture comprised of Sidney Salomon, Jr. & Associates, Inc. and Insurance Consultants, Inc.

5. Since 1946, plaintiffs Salomon's method of sales and promotion in the life insurance business has remained unchanged and the relationship between plaintiff, Sidney Salomon, Jr., and defendant, Crown Life Insurance Company, continued uninterrupted until 1972.

6. Plaintiff, Sidney Salomon, Jr., was and is a well-known national personality in the fields of business, sports and politics, and is active in educational, civic and charitable endeavors locally and throughout the United States. Through favorable publicity and the adoption of the "center of influence" method of selling, plaintiff, Sidney Salomon, Jr., without financial contributions from defendant Crown, conducted advertising and promotional campaigns to bring recognition to defendant Crown and to enhance the sale of life insurance to Crown's benefit.

7. As a result of the activities mentioned in the previous paragraph, plaintiff, Sidney Salomon, Jr., developed a very successful life insurance sales business. As a result of these endeavors plaintiff, Sidney Salomon, Jr., and the corporate entities as described in finding of fact paragraph number 4. received numerous awards as one of the top insurance agencies of defendant Crown.

8. At their own expense, plaintiffs Salomon recruited and trained life insurance agents, brokers and administrative personnel including Robert V. Klostermeyer, James T. Blair, III, and W. Andrew Bradley.

9. Klostermeyer was recruited by plaintiffs Salomon in 1961 and from that date was a broker and administrative employee of the general agency. Blair was recruited by plaintiffs Salomon in 1957 and received compensation through August 1, 1972. Prior to November 15, 1970, W. Andrew Bradley was an employee of defendant Crown and entered the employ of plaintiff, Sidney Salomon, Jr. & Associates, Inc., as an administrative employee and broker and received compensation therefor.

10. Mr. Bradley was suggested as a possible employee to plaintiffs by defendant Crown. The events subsequent to his employment by plaintiffs Salomon indicate to the Court that his role was to be a "Trojan Horse" for the defendant Crown to further their plans for the later termination of plaintiffs Salomon's contract.

11. As a result of the camouflaged actions of Mr. Bradley, David Williams, an officer of defendant Crown, visited Klostermeyer, Blair and Bradley in May of 1972, at plaintiffs Salomon's offices in St. Louis, Missouri. On July 6, 1972, Klostermeyer met with executives of defendant Crown in Toronto, Canada, and discussed the termination of the St. Louis general agency and entered into negotiations with defendant Crown executives for the acquisition and appropriation of the existing

and future business of the St. Louis agency for defendant Crown. The St. Louis business until that time had been exclusively handled by the plaintiffs as the agents of defendant Crown.

12. On or before July 10, 1972, under express instructions from Klostermeyer, Bradley began a search for office space for the new St. Louis agency of Crown Insurance Company, while he was then in the employ of Sidney Salomon, Jr. Life Assurance Agency.

13. On July 6, 1972, Clark Lloyd, an officer of defendant Crown, made a determination to terminate the business relations that existed between plaintiff, Sidney Salomon, Jr., and the defendant Crown which had existed for a period of 26 years. After having concluded on July 6, 1972 to terminate the said business relations, Clark Lloyd met with plaintiff, Sidney Salomon, Jr., ostensively to discuss the continuation of business relations under a new format. Lloyd offered plaintiffs Salomon 25% of the profits generated by the agency under the new format and suggested that defendant Crown would run the agency, with the capital stock being held by Charles Burns, Chairman of the Board of defendant Crown. Charles Burns is a citizen of Canada.

14. July 28, 1972, Klostermeyer, Blair and Bradley, while under brokerage contracts with Sidney Salomon, Jr. Life Assurance Agency, and while receiving compensation therefrom, formed a corporation known as Crown Associates of St. Louis, Inc., for the sale of life insurance for the defendant Crown. On August 1, 1972, Klostermeyer, Blair and Bradley passed a resolution providing compensation to each as officers of the Crown Associates of St. Louis, Inc. Crown Associates of St. Louis, Inc. filed its 1972 Income Tax Return which disclosed that 50% or more of the capital stock of Crown Associates of St. Louis, Inc., is owned by an alien.

15. On various occasions during the months of July and August of 1972, with the knowledge that Crown Associates of

St. Louis, Inc. was incorporated or was in the process of being incorporated, officers of defendant Crown were in the process of encouraging and enticing Klostermeyer, Blair and Bradley to violate their fiduciary relationship with Salomon, to terminate the general agency agreement, and encouraging the acquisition of the general agency contract by Klostermeyer, Blair and Bradley. These actions being done with the knowledge that the said Klostermeyer, Blair and Bradley were performing services for, and receiving compensation from, the Sidney Salomon, Jr. Life Assurance Agency.

16. By letter dated August 9, 1972, defendant Crown terminated the Sidney Salomon, Jr. Life Assurance Agency effective 30 days after the mailing of that letter. As a member of the joint venture, said termination letter effectively terminated the business relationship that existed between plaintiffs Salomon and defendant Crown. In the event plaintiffs Salomon resisted the termination of the general agency agreement, defendant Crown was prepared to use certain political pressures to prevent him from collecting the renewal fees.

17. Defendant Crown knew that the termination of the Sidney Salomon, Jr. Life Assurance Agency, with the resulting effect of effective termination of the business relationship between Sidney Salomon, Jr. and Sidney Salomon, Jr. & Associates, Inc., would, along with the acquisition by Crown Associates of St. Louis, Inc. [as new general agent] of the key personnel of the prior general agency, result in irreparable damage and injury to the plaintiffs, and knew that the plaintiffs could not continue to operate successfully.

18. For many years prior to this termination, officers of defendant Crown represented to Sidney Salomon, Jr. that he, Sidney Salomon, Jr., could always have a general agency contract and, therefore, declined to provide a pension for him. The general agency agreement provides for vested renewals to the

tenth year of premium payments and 3% of the renewals thereafter. As a result of the termination of the general agency agreement, defendant Crown knew that the promised vested renewal commissions in the amount of "3% thereafter" could not be realized by plaintiffs Salomon. The "3% thereafter" renewal commissions have been paid to Crown Associates of St. Louis, Inc. since its appointment of the new general agent.

19. Defendant Crown designated an agency code number 370 as a form of identification of the general agency known as Salomon, Hannegan, Portnoy & Associates, Inc.; Sidney Salomon, Jr. & Associates, Inc. was identified as agency code number 371; Sidney Salomon, Jr. Life Assurance Agency was designated agency code no. 372. Until the date of termination of the general agency agreement, Sidney Salomon, Jr. was the beneficiary of renewal commissions and other compensation for general agencies designated code numbers 370, 371 and 372. The actuarial value of projected compensation on renewals on insurance in force for a period of 20 years to the year, 1992, discounted to the year, 1972, was established by expert testimony and is as follows:

Agency Code Number 370:	
Salomon, Hannegan, Portnoy & Associates, Inc.	$130,778.00
Agency Code Number 371:	
Sidney Salomon, Jr. & Associates, Inc.	367,680.00
Agency Code Number 372:	
Sidney Salomon, Jr. Life Assurance Agency	37,193.00
Total	$535,651.00

20. The average annual volume of new business of a continuing agency was established by expert testimony, as projected actuarily based upon past performance, in this case to be in the amount of $4,375,000.00. The expert actuarial evidence further showed that the value of projected compensation for a continuing agency such as the one run by plaintiff in this case would be in the amount of $920,093.00 for a period of 20 years to the year, 1992, discounted to present values for the year, 1972.

21. The total reasonable actuarial projected computed value of compensation for a general agency such as operated by plaintiff based on a period of present and future business for 20 years is in the amount of $1,455,734.00.

22. The cost of collection of the premiums and policies in force on December 31, 1972, was in the approximate amount of $5,000 annually.

23. Each general agency agreement such as the one existing between plaintiffs Salomon and defendant Crown provided that the agreement would terminate automatically upon the death of the general agent, or the termination of the general agent's license. The agreement further provided that if it was terminated and not replaced by a new agreement between the general agent and the company, the company would pay the general agent, if living, otherwise to his executors or administrators, certain designated bonuses and renewal commissions to the tenth policy year less a scheduled collection fee.

24. The net worth of defendant Crown Life Insurance Company, as revealed by its annual statement on December 31, 1972, is in the amount of $65,909,000.00.

Findings of Fact

Portnoy-Tessler & Associates

vs.

Crown Life Insurance Company

No. 72 C 547 (3)

1. As stated in finding of fact number 4 for plaintiffs Salomon v. defendant Crown above, plaintiff-intervenor, Portnoy-Tessler & Associates, was a corporate entity which plaintiff, Sidney Salomon, Jr., was a shareholder.

2. Plaintiff-Intervenor's complaint alleges that defendant Crown engaged in disparate treatment of it with regards to plaintiffs Salomon. It is also alleged by Portnoy that defendant Crown has become unjustly enriched due to its activities against plaintiffs Salomon.

3. The Court finds no evidence that plaintiff-intervenor has been wronged or grieved by the actions of defendant Crown in regards to plaintiffs Salomon.

4. This Court sitting as the trier of fact is of the opinion that no wrong has been suffered by plaintiff-intervenor due to the conspiratorial acts of defendant Crown directed towards plaintiffs Salomon.

Findings of Fact

Crown Life Insurance Company

vs.

Sidney Salomon, Jr. & Associates, Inc.

and

Insurance Consultants, Inc., d/b/a
Sidney Salomon, Jr. Life Assurance Agency

No. 72-582 (3)

1. As stated in this Court's findings of facts for the complaint of plaintiffs Salomon, defendant, Sidney Salomon, Jr., acting through corporate entities has represented plaintiff Crown Life Insurance in the sale of life insurance since 1946.

2. Since 1946, defendant Salomon has obtained pertinent personal and confidential information from policyholders pursuant to the conduct of his life insurance business.

3. Sidney Salomon, Jr. is the owner and Chairman of the Board of Sidney Salomon, Jr. & Associates, Inc. On May 15, 1971, Sidney Salomon, Jr. & Associates, Inc. and Insurance Consultants, Inc., d/b/a Sidney Salomon, Jr. Life Assurance Agency as members of a joint venture and plaintiff Crown entered into a contract with each other. Notice of the termination of said contract dated August 9, 1972, was mailed to the defendants Salomon.

4. Said contract contained the provision as follows:

> "20. All records, letters, or other documents relating to the business to be transacted under this agreement shall be open to inspection by [Crown Life Insurance Company] at any time, and, at the termination of this Agreement,

shall be turned over to the company together with any other of the company's property then in the general agent's possession."

5. That defendants on August 9, 1972, and until the present time have had in their possession the documents described in Schedule B of plaintiff's complaint:

A. Premium Record Cards.

B. Numerical Index Cards.

C. Alphabetical Index Cards.

D. Status Cards.

E. Files of Correspondence.

F. Files of Group Insurance Records.

6. That demand for the records was made on September 11, 1972, not on either of the defendants named herein but on one Mary Cronin.

7. The records sought contain information which has been compiled by Sidney Salomon, Jr., in the operation of his various life insurance agencies over a period of approximately 25 years and consist of personal and confidential information.

8. Plaintiff Crown provided the basic forms and supplies, on which the information sought is contained, but that the information contained thereon as a result of the time and efforts of Sidney Salomon, Jr. and his associates personally for a period of approximately 25 years.

9. Any information which was recorded by the plaintiff and held by defendants was of a compilation and recording nature rather than an original product of defendants.

10. The defendants have previously complied with this Court's Orders and have tendered to plaintiff Crown all those documents

and records which are necessary to provide a high level of service to plaintiff's policyholders.

11. Certain records sought by plaintiff Crown were reproduced for the convenience of its general agents, herein the defendants. Those records were reproduced not for plaintiff Crown's use but for the use of the defendants.

12. All information which is presently sought by plaintiff Crown is presently maintained by means of electronic data storage in plaintiff's computer system, and is available through ordinary data retrieval methods to plaintiff by plaintiff's own employees at plaintiff's own headquarters.

General Findings of Fact

The present case, due to its complicated posture and numerous parties, does not lend itself particularly well to specific point-by-point factual analysis. Since this is a bench-tried matter the Court is faced with the dual responsibility of determining both findings of fact and conclusions of law.

As the finder of fact, the Court like a member of the jury impaneled to hear a case is allowed to draw by reasonable inferences from the admissible evidence what the facts surrounding the case are. The Court is also allowed to consider in its own mind the credibility of the various witnesses which testify before it. In case No. 72 C 547 (3), it is overwhelmingly certain that a wrong has been done to plaintiffs Salomon. The general impression drawn from the evidence is that defendant Crown conspired with certain of plaintiffs' employees to subvert a business relationship which had existed for more than 25 years and had been extremely profitable to all parties concerned. The evidence brought forth by defendant Crown to counter the claims of plaintiffs Salomon is simply not credible to this Court.

It is obvious to the Court that defendant Crown conspired with certain of plaintiffs Salomon's employees to end the relationship which had existed between the parties for a number of years. Such a termination is certainly not wrong, and was well within the rights of defendant Crown, however, defendant Crown injured the plaintiffs Salomon by its successful subversion of plaintiff Salomon's employees and agents prior to the termination of the contract. Such subversion clearly constituted what this Court feels is a tortious interference with contractual relationships. The overall demeanor of the defendant Crown in this matter was one of underhanded and deceptive dealing. It must be noted that the Court finds no wrong in terminating the contract between the parties, the Court finds the wrong in the defendant Crown's dealing with plaintiffs Salomon's agents before the termination of the contractual relationship.

With regards to the complaint of plaintiff-intervenor, Portnoy, Tessler & Associates, Inc., the Court finds that no damage was done to plaintiff-intervenor. Plaintiff-intervenor may have suffered a diminution of income but this is due to the lawful termination of the contractual relationship between plaintiffs Salomon and defendant Crown. Even by the use of inference, the Court finds no basis for saying that plaintiff-intervenor was damaged by defendant Crown's conspiratorial actions.

In case number 72 C 582 (3), the Court finds plaintiff Crown's claims for certain of defendants Salomon's records to be totally without merit. The factual evidence is quite clear on its face that the records which plaintiff Crown seeks are readily available to plaintiff within its own data processing system. This combined with the obviously unclean hands of Crown Life due to its conspiratorial actions in case No. 72 C 547 (3) clearly bars the equitable relief sought by plaintiff Crown Life, and the damages sought.

Conclusions of Law

I

In a bench tried case such as this, there is a two step test to be made before the plaintiff may recover. The plaintiff must first establish that according to law he has a cause of action which may be maintained. Once that question of law has been met, the plaintiff must then carry his burden of proof as to the factual questions before the Court or a jury as the case may be. In case number 72 C 547 (3), plaintiffs' legal theory is that defendant Crown tortiously interfered with certain contract relations between plaintiffs Salomon and plaintiffs' employees, namely the employment as insurance agents of Messrs. Klostermeyer, Blair and Bradley by defendant Crown. It has long been held that such interference with business relations constitutes an actionable tort. 86 C.J.S., *Torts*, § 44.

Defendant Crown has placed great emphasis on the fact that its contractual relationship with the plaintiffs was terminated pursuant to the provisions of the contract between the parties. While this is true, defendant overlooks its conduct prior to the termination of its contractual relationship with the plaintiffs Salomon. The facts are uncontroverted that defendant Crown conspired with Klostermeyer, Blair and Bradley while they were under brokerage contracts with the plaintiffs to set up a superseding insurance agency to act as the Missouri general agent for defendant. In a similar factual situation the 8th Circuit held that such a conspiracy is an actionable tort. *Falstaff Brewing Corp. v. Iowa Fruit & Produce Co.*, 111 F.2d 101 (8th Cir., 1940). That case involved, as the present case before the Court, a sales agency contract between one party for exclusive sales within a given geographic area. The defendant in *Falstaff*, supra, solicited the employment of plaintiffs, three sales personnel, and thereafter dissolved the contract between plaintiffs and defendant and set up a similar distributorship employ-

ing plaintiffs' previous sales force. As the Missouri courts have also stated, a person who conspires with another to induce an unjustified violation of his contract with a third person commits an actionable wrong. *Downey v. United Weather Proofing*, 253 S.W.2d 976 (Mo., 1953); *Mills v. Murray*, 472 S. W.2d 6 (Mo., Ct. of App., 1971). A further requirement for recovery under this theory of tort law in Missouri is that the absence of justification for the defendant's conduct must be shown. *Cady v. Hartford Accident & Indemnity Co.*, 439 S.W. 2d 483 (Mo., 1969). This view of the law of tortious interference with contract relations has been reaffirmed by the Eighth Circuit in *Harber v. Ohio National Life Insurance Co.*, No. 74-1637, Feb. 26, 1975.

The factual similarity between *Falstaff*, supra, and the present case is striking. Defendant Crown asserts that its actions were not tortious since it was merely seeking the employment of certain parties, namely, Klostermeyer, Blair and Bradley. Such competitive solicitation of other persons' employees is certainly permissible under the free market system upon which the American economy operates. However, there are certain factual distinctions which render the defendant's actions tortious. Here, Klostermeyer, Blair and Bradley set up a Missouri corporation with the encouragement of defendant Crown to be ready to take over the business of plaintiffs as soon as defendant Crown terminated its contract with plaintiffs Salomon. It is significant to the Court that the negotiations between defendant Crown and Klostermeyer, Blair and Bradley took place while those gentlemen were within the employ of plaintiffs Salomon. The "Trojan Horse" nature of Mr. Bradley's actions further indicates the culpability of defendant Crown's activities. Also, the facts in this case support a reasonable inference that these activities were of a surreptitious nature and were actively concealed from the knowledge of plaintiffs.

Here, the situation is one of where valued employees and agents of the plaintiffs have served the defendant Crown for

a period of twenty-five years and produced significant amounts of income as recognized and awarded by the defendant, and for some reason, upon which the Court will not speculate, the defendant Crown saw fit to reward the plaintiffs by conspiring with two of plaintiffs' employees through the aid of a camouflaged servant, namely, Bradley, to set up a surreptitious corporation to take over plaintiffs' business. The record produced at trial is perfectly clear that the actions of defendant Crown were without any justification.

This Court is satisfied that an actionable wrong was created by defendant Crown's conduct and as the findings of fact amply show, plaintiffs Salomon are entitled to recovery.

The Court's computation of damages was arrived at after careful and close consideration of the voluminous expert testimony which was adduced at trial concerning the future income possibilities of plaintiffs Salomon had the contractual relationship between the parties continued. The general rule for determining damages in an action for tortious interference with business relations is that the plaintiff will be entitled to recover as damages, the loss, which, except for such interference, the plaintiff would have been able to attain or enjoy, including such loss of profits as the plaintiff can prove to have resulted directly and proximately from the wrongful acts, 45 AM.JUR. 2d; *Interference*, §57. The Missouri Supreme Court has adopted this general rule in *Coonis v. Rogers*, 429 S.W.2d 709 (Mo., 1968). Since this is not a breach of contract action, but rather one sounding in tort, the determination of damages is not subject to a precise mathematical computation. The damages are computed in accordance with the Court's sitting as the finder of fact and are in light of the Court's view of what a typical juror would have assessed had this case been tried before a jury. "Once the fact of damage has been established, courts are allowed considerable leeway in arriving at the amount of damages." *Dean Foods Company v. Albrecht Dairy Company*, 396 F.2d 652, 660 (8th Cir., 1968).

Plaintiffs Salomon have prayed for punitive damages in this matter, and considering the overall actions of defendant Crown concerning this matter, it is this Court's opinion that punitive damages are well warranted. Such damages have been held permissible for tortious interference actions such as the one presently at bar. *Mills v. Murray, supra.* It is apparent to this Court that defendant Crown's attitude towards plaintiffs Salomon, while the activities complained of were taking place, was one of concealment and deceit. Since the theory of exemplary damages is punishment and deterrence, they are particularly appropriate here. *Ford Motor Credit Company v. Hill,* 245 F. Supp. 796 (E.D.Mo., 1965).

II

With regards to the claim of plaintiff-intervenor, Portnoy-Tessler & Associates, Inc., it is this Court's determination that as a question of fact plaintiff-intervenor has shown no damage arising out of the cause of action of plaintiffs Salomon against defendant Crown. Accordingly, judgment will be entered for the defendant Crown upon the plaintiff-intervenor's claim.

III

In this part of the consolidated action in case number 72 C 582 (3), plaintiff Crown seeks from the named defendants certain business records in the possession of defendants which supposedly relate to the life insurance business of plaintiff Crown Life. As the findings of fact discussed above clearly show that defendants in this action have tendered unto plaintiff Crown those records ordered by this Court, no further relief will be granted. The denial of relief is based upon several conclusions. The first being that the records plaintiff Crown seeks are clearly not "relate[d] to the business to be transacted" under the general agency agreement between the parties, but are records related to the past and future business of defendants Salomon, containing personal and confidential information of policyholders. The facts as shown by the evidence adduced at trial clearly show that plaintiff Crown has available the records that it seeks within Crown Life's own computer system, and that those records are easily obtainable through electronic data retrieval methods. Finally, considering the verdict and the actions of plaintiff Crown in case number 72 C 547 (3), it is apparent that plaintiff Crown has entered this Court with unclean hands, and, the ancient maximum that he who has unclean hands shall not recover, will be followed. Accordingly, in case number 72 C 582 (3) judgment will be entered for the defendants Salomon.

Dated this 4th day of March, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

United States Court of Appeals
for the Eighth Circuit

September Term, 1975

No. 75-1537
Sidney Salomon, Jr., et al.,
Appellees,

vs.

Crown Life Insurance Company,
Appellant.

No. 75-1538
Crown Life Insurance Company, etc.,
Appellant,

vs.

Sidney Salomon, Jr. and Associates, Inc., etc., et al.,
Appellees.

No. 75-1544
Portnoy-Tessler & Associates, Inc.,
Appellant,

vs.

Crown Life Insurance Company,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

The Court having considered petitions for rehearing en banc filed by counsel for appellant and appellees and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

July 16, 1976